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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES

FILE: B-205594.2

DATE: June 29, 1982

MATTER OF: Lear Siegler, Inc.

DIGEST:

1. Apparent low bid on contract for 6-month base period and 3 option years is materially unbalanced since there is reasonable doubt that acceptance of this bid--which has substantially front-loaded base period price and does not become low until after all options have been exercised--will result in the lowest ultimate cost to the Government.
2. Solicitation bid evaluation formula provided for evaluation of all option years, but did not contain required provision proscribing the submission of unbalanced bids. Consequently, it would be improper to permit award to second low bidder upon rejection of low, unbalanced bid; therefore, the solicitation is materially defective and should be canceled.

Lear Siegler, Inc. (LSI), protests the proposed award of a contract to Space Age Engineering, Inc. (SAE), under invitation for bids (IFB) No. DAKF40-81-B-0001, issued by the Army for the operation of the transportation motor pool at Fort Bragg, North Carolina. LSI protests that SAE's bid should be rejected as nonresponsive because it is, allegedly, materially unbalanced.

We sustain the protest.

The IFB was issued for cost comparison purposes under the guidance of Office of Management and Budget Circular No. A-76. The bids submitted permitted the Army to determine that the cost of contractor

performance was sufficiently lower than the cost of continued in-house performance to warrant contracting out. The IFB schedule provided for a base period of 6 months and for three option periods--the first two for 12 months each, the last one for 6 months, with contract performance to commence 60 days after award. The IFB provided for evaluation of price on the basis of the base period plus all three option periods, but it did not contain any provision regarding the submission of "unbalanced" bids.

Thirteen bids were received. The low bidder was permitted to withdraw on the grounds of mistake. Of the remaining 12 bids, SAE's bid of \$4,150,341 for the base year plus option years, including its prompt-payment discount, was low; LSI's bid of \$4,248,510 was next low. The bids were presented in the form of monthly prices for each of the periods in question. SAE's bid price (before prompt-payment discount) was \$275,185 per month in the base period, \$97,586 per month in the first option year, \$80,920 per month in the second option year and \$80,920 per month in the third option year. LSI's bid price was \$127,337 per month in the base period, \$116,054 per month in the first option year, \$115,834 per month in the second option year and \$116,972 per month in the third option year. Thus, while SAE's total price was apparently low, the company was to receive \$1,651,110 (less 3-percent, prompt-payment discount) for the first 6 months of performance, compared with the \$764,022 which LSI would receive for the same base period.

The contracting officer determined that SAE's bid was nonresponsive because it was unbalanced. In relevant part, the contracting officer determined the following:

"SAE's first period bid price at 282% of that for second period and 340% of that of the third and fourth is compared to variance in bid prices of the other 12 bidders using the first and second periods. The variance ranges from 99% to 115%. The magnitude of SAE's enhancement of its first period bid price indicates a mathematically unbalanced bid.

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"* * * The result of accepting the unbalanced bid from SAE is considered to be material.

"Once some or all of the payments of the enhanced bid prices during the first period are made, the Government assumes an inordinate amount of risk of loss should the contract be terminated or the option not exercised. In the first period, it is anticipated that procurement costs would be less than the amounts that would have to be paid to SAE, making a termination for default advantageous to the contractor. During subsequent periods, * * * SAE might well be enriched by a termination for default because of part of the overpayment from the first period remaining in his possession.

"As the bid from SAE is mathematically and materially unbalanced, it cannot be determined that, if accepted, it would result in the lowest ultimate overall cost to the Government. The bid from SAE is therefore determined to be nonresponsive and is rejected."

Accordingly, the contracting officer advised SAE that:

"Although your total bid is \$28,169.00 less than that of Lear Siegler, the effect of the magnitude of the enhancement of the first period price makes it apparent that acceptance of your bid would not result in the lowest ultimate overall cost to the Government."

Upon learning that its bid had been rejected as nonresponsive, SAE filed a protest with our Office and instituted a suit in the United States District Court for the Central District of California. Thereupon, the contracting officer reconsidered his decision and determined that SAE's bid was responsive. In a new determination, the contracting officer stated that:

"1. Bid from Space Age Engineering (SAE) was determined to be mathematically and materially unbalanced and was rejected as nonresponsive because of doubt that the bid presented the lowest ultimate overall cost to the Government.

"2. At the request of SAE and upon advice of counsel, relevant decisions of the Comptroller General were reviewed. * * *

"3. The IFB provides for awarding a Contract to that bidder whose bid is most advantageous to the Government but does not specifically prohibit unbalanced bidding.

"4. All but one bidder submitted bids unbalanced to some extent.

"5. When reevaluated in accordance with the IFB, which represents the needs and funding expectations of the Government, the bid for SAE is found to be mathematically but not materially unbalanced.

"6. It is determined that the rejection of SAE's bid was based upon incorrect evaluation and the rejection is now set aside. SAE's bid is accepted as apparently low after evaluation with prompt payment discount."

Accordingly, the Army proposed to award the contract to SAE. Upon learning of this decision, LSI protested to our Office alleging, among other things, that SAE's bid was, in fact, materially unbalanced and should be rejected as nonresponsive.

Defense Acquisition Regulation (DAR) § 1-1504(c) (Defense Acquisition Circular (DAC) No. 76-6, January 31, 1977), which provided the basis for evaluation of the option years in determining overall low cost to the Government, requires that a clause substantially similar to that contained at DAR § 7-2003.11(b) (DAC No. 76-6, January 31, 1977) be included in the solicitation. This solicitation included part "A" of that clause, which provides that all option quantities shall be evaluated for purposes of award, although this will not obligate

the Government to exercise the options. However, it failed to include part "B," which permits the rejection of unbalanced bids. Specifically, the omitted part states that:

"Any bid or proposal which is materially unbalanced as to prices for basic and option quantities may be rejected as non-responsive. An unbalanced bid or proposal is one which is based on prices significantly less than cost for some work and prices which are significantly overstated for other work."

Our Office has recognized that unbalanced bidding entails two aspects. The first is a mathematical evaluation of the bid to determine whether each bid item carries its share of the cost of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect--material unbalancing--involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is materially unbalanced if there is a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will not result in the lowest ultimate cost to the Government. Consequently, only a bid found to be materially unbalanced may not be accepted. Reliable Trash Service, B-194760, August 9, 1979, 79-2 CPD 107, and cases cited in text.

Here, the contracting officer initially found that SAE's bid was both mathematically and materially unbalanced and, therefore, nonresponsive. In particular, the contracting officer found that the enhanced base year price in conjunction with the possibility of termination in the base period and the nonexercise of all of the options made it impossible to conclude that SAE's bid offered the lowest overall cost. The subsequent determination indicates that the bid is found mathematically, but not materially, unbalanced. However, it provides no factual basis for this change in evaluation other than to state that reevaluation was done "in accordance with the IFB, which represents the needs and funding expectations of the Government."

In our view, the SAE bid is mathematically unbalanced, given the above pricing facts. See Reliable Trash Service, above. Although the Army's counsel argues that SAB may properly "front-load" its "start-up and

training costs" in this manner without submitting a mathematically unbalanced bid. Reliable Trash Service suggests the contrary conclusion.

LSI's total bid is significantly less than SAE's for the base period and throughout the first option years. It is not until the final option period is more than half completed that SAE's total cost to the Government becomes lower than LSI's. This results from LSI's heavily front-loaded bid structure. Under these circumstances, we concur with the contracting officer's initial finding that the Government would assume an inordinate risk of loss after payment of the enhanced bid price during the base period. Despite the Army's current position that it "expects to exercise the options," we believe that, in view of SAE's front-loaded bid structure and the fact that it is not until well after the exercise of the third and final option year that SAE's total cost becomes low, there is reasonable doubt that award to SAE will result in the lowest ultimate cost to the Government.

Accordingly, we conclude that SAE's bid should be rejected. However, the IFB failed to include a clause warning bidders of the possible rejection of unbalanced bids as nonresponsive. As noted above, such a clause is mandated in this IFB under DAR §§ 1-1504(c) and 7-2003.11(b). In the absence of this clause, the stated evaluation formula appeared to permit the submission of unbalanced bids. See Moore Service, Inc., et al., B-204704.2, June 4, 1982, 82-1 CPD _____. SAE submitted a materially unbalanced bid. However, to require that its bid be rejected in the absence of the unbalancing clause and to permit award to LSI would, in effect, permit award under an IFB which deprived all bidders of the opportunity to compete on an equal basis. Thus, under the present circumstances, the IFB contains a material defect which provides the basis for cancellation. See Ehrlich Construction Company, B-187726, February 14, 1977, 77-1 CPD 105.

Accordingly, we recommend that the IFB be canceled and the requirement be rescinded. By letter of today, we are advising the Secretary of the Army of this recommendation.

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

Robert A. ...
Comptroller General
of the United States